



12
JUN 7 1945

CHARLES ELMORE GROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1283

JERRY VOGEL MUSIC Co., INC.,

Petitioner,

v.

FORSTER MUSIC PUBLISHER, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

JULIAN T. ABELES,
EDWIN P. KILROE,
Counsel for Respondent.



INDEX

	PAGE
Summary of Matter Involved	1
Facts	2
The Evidence Conclusively Dissipated Petitioner's Claim of Smith's Alleged Co-authorship	3
POINT I—The certificate of original copyright regis- tration was prima facie evidence under Sec. 55 of the Copyright Law, of Taylor's sole author- ship	5
POINT II—As Smith was not an author he would have no right of renewal	6
POINT III—The Trial Court properly excluded the testimony of Smith under Sec. 347 of the New York Civil Practice Act, concerning his alleged personal transaction with decedent Taylor	7
A. Smith was incompetent to testify under Sec. 347	7
B. The certificate of copyright registration was not testimony of decedent Taylor constituting a waiver under Sec. 347. It is the settled construction of the New York Court of Ap- peals that such testimony means the "sworn" statements of the decedent	8

CASES CITED

Kings County Trust Co. v. Hyams, 242 N. Y. 405 ..	9
Lawyer v. White, 198 N. Y. 318	9
Lewis v. Merritt, 98 N. Y. 206	9
Matter of Boesenbergh, 265 App. Div. 484	9
Matter of Callister, 153 N. Y. 294	8, 9
Matter of Seigle, 289 N. Y. 300	9
Merritt v. Campbell, 79 N. Y. 625	9

OTHER AUTHORITIES

	PAGE
Copyright Law	
17 U. S. C. Sec. 23	6
17 U. S. C. Sec. 55	5, 6
New York Civil Practice Act	
Sec. 347	7, 8, 9

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1283

JERRY VOGEL MUSIC Co., INC.,

Petitioner,

v.

FORSTER MUSIC PUBLISHER, INC.,

Respondent.

BRIEF FOR RESPONDENT

Plaintiff seeks to review a judgment of the Circuit Court of Appeals for the Second Circuit (reported in 147 F. (2d) 614).

None of the Questions of Law Argued by Petitioner Were Involved. The Case Turned Upon a Question of Fact.

Summary of Matter Involved

The action was for a declaratory judgment (a) that one Tell Taylor as the sole author, obtained the exclusive renewal of the copyright in the musical composition entitled "Down By The Old Mill Stream", and that plaintiff as assignee became the sole proprietor of such renewal, and (b) that defendant Earl K. Smith was not a co-author of said musical composition, so that the renewal application filed by him as co-author, and his purported assignment to defendant Jerry Vogel Music Co., Inc., were invalid.

Thus the Trial Court had for determination, and determined, the factual question—was Smith a co-writer of the composition? This plaintiff concedes in its petition (p. 2) “Thus the case proceeded to trial with the issue of authorship being squarely presented * * *, not only that Taylor was the sole author but that Smith was not a co-author. The Trial Court concluded plaintiff was the owner of the renewal term of copyright, holding that Taylor had been the sole author; * * *.”

Facts

August 15, 1910. Tell Taylor registered the copyright, as the sole writer, *i. e.*, “Words and music by Tell Taylor” (P. Ex. 1).

October 23, 1931. Taylor executed a written assignment of the copyright to respondent, which was recorded in the Copyright Office on December 9, 1931 (P. Ex. 2).

September 1, 1937. Taylor registered his application for the renewal copyright, as the sole writer (P. Ex. 3).

August 11, 1938. The original copyright expired.

August 14, 1937. Petitioner registered an application for the renewal copyright, in the name of Earl K. Smith as an alleged co-author (D. Ex. D).

November 23, 1937. Taylor died (P. Ex. 5).

December 10, 1937. All of Taylor’s heirs executed a written assignment of the renewal copyright to respondent, which was recorded in the copyright office on December 16, 1937 (P. Ex. 7).

August 15, 1938. The claim was first asserted of Smith’s alleged co-authorship (in a notice sent by petitioner to the trade (R. p. 24)).

March 13, 1939. Neither petitioner nor Smith having instituted any action, their notice of August 15, 1938 so impaired respondent's rights that it was obliged to institute this action.

The Evidence Conclusively Dissipated Petitioner's Claim of Smith's Alleged Co-authorship

(a) On only *one* of the *two* copies filed by Taylor with his application for the original registration (August 15, 1910), Smith's name appeared on only the first sheet of music (apparently stamped) above that of Taylor, but in much smaller letters and without *any indication* that Smith was a co-writer (D. Ex. A). Smith and petitioner having waited for 28 years (until after Taylor's death in 1937) to assert their alleged claim, Taylor's testimony was not available to explain this obvious error.

(b) The title page of the copy bearing Smith's name (in smaller letters above that of Taylor on only the first sheet of music) bears the wording in large type "By Tell Taylor" (D. Ex. A).

(c) The certificate of original copyright registration stated that Taylor was the sole writer of both the "Words and music" (P. Ex. 1).

(d) None of the *nine* editions of the composition published since August 12, 1910 (date of first publication) bore Smith's name (P. Ex. 3). One edition was the same as that of which the two copies were filed by Taylor with his application for registration on August 15, 1910.

(e) Petitioner would have it appear that respondent's evidence was limited to the copyright certificate, and that petitioner was estopped from introducing any testimony of Smith's alleged co-authorship. On the contrary peti-

tioner's claim of Smith's alleged co-authorship was conclusively refuted by the various exhibits (P. Exs. 1-4B, 13; D. Ex. A) and by the testimony of respondent's witnesses Charles Miller (R. pp. 75-84) and Walter W. Goodell (R. pp. 85-91). Furthermore petitioner adduced the testimony of two witnesses, George A. Little (R. pp. 39-50, 91-92) and Bethule A. Healy (R. pp. 50-65). The testimony of both witnesses proved highly unfavorable to petitioner (which obviously accounts for petitioner completely ignoring these witnesses in its brief). Little admitted that Smith's name only appeared in "very fine type" on the first page of music (R. p. 41) of one of the two copies on file in the Register's Office (R. pp. 48, 49); that Smith was not credited as a co-writer because he had only made a minor contribution (a few chords and one line of the lyric (R. p. 47); and that Taylor had always asserted sole authorship (R. p. 49). Healy admitted that she had never met Taylor or Smith until 1918 (eight years after the composition was registered for copyright), so that she could not possibly have any knowledge of Smith's alleged co-authorship (R. pp. 51, 59).

(f) Although the composition has been a very popular song continuously since its first publication in 1910 (R. p. 41), the first claim to Smith's alleged co-authorship was asserted in 1938 (R. p. 24), after Taylor's death in 1937, and no suit was ever instituted by Smith or petitioner to establish such alleged claim.

The Trial Court said in part (R. pp. 113, 114):

"The record discloses no evidence that Smith at any time during the lifetime of Taylor ever asserted a formal claim of co-authorship. The record, however, does disclose that Taylor, or the plaintiff, Forster Music Publishers Inc. as the assignee of Taylor published, from 1910 to 1938, some nine editions of the song, and that in all of these editions, Taylor was indicated as being the sole author. It was also established that Taylor in 1937 filed an appli-

ation for and received the renewal copyright on 'Down by the Old Mill Stream' in his name, as the sole author.

Plaintiff offered the depositions of Charles Miller and Walter Goodell, showing that they were music arrangers and had close business connections with Taylor and Smith, before, during and after the copyrighting, publication and sale of 'Down by the Old Mill Stream', indicating that to their knowledge, Smith never asserted a claim to co-authorship.

The defendant offered the testimony of one Little, a songwriter, and the deposition of Mrs. Healy, a singer, both of whom knew Taylor and Smith. Their testimony appears to be that in the course of conversations with the deceased, they heard him admit that Smith had something to do with the song. But their testimony clearly indicates that Taylor always claimed to be the sole author of 'Down by the Old Mill Stream'.

From all the evidence and exhibits, the only item of any probative value for the defendant's claim of Smith's co-authorship is the fact that Smith's name appears on the filed original copy. In contrast, we have the certificate of copyright issued to Taylor as sole author, his continued assertion of the claim of sole authorship during his entire lifetime, and the publication of nine editions as sole author.

It appears to me that the defendant's one item of probative value is overwhelmed by the evidence adduced by the plaintiff. The plaintiff is therefore entitled to the declaration of rights which it seeks."

POINT I

The certificate of original copyright registration was prima facie evidence under Sec. 55 of the Copyright Law, of Taylor's sole authorship.

Sec. 55 (17 U. S. C.) specifically provides, that the certificate shall state, among other things:

"the name of the author (when the records of the copyright office shall show the same)",

and that,

“Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein.”

While petitioner would have it appear to the contrary, one of “the facts stated therein” was that of Taylor’s sole authorship of *both* the words and music (P. Ex. 1).

“Musical Composition entitled Down By The Old Mill Stream. Words and music by Tell Taylor.”

Petitioner has been unable to cite any Circuit Court decision to support its erroneous argument, for the reason that they have uniformly followed the clear wording of Sec. 55, to the contrary.

POINT II

As Smith was not an author he would have no right of renewal.

The Trial Court found (R. p. 114):

“1. Earl K. Smith was not a co-author of the musical composition entitled ‘Down by the Old Mill Stream’.”

“2. Tell Taylor was the sole author of the musical composition entitled ‘Down by the Old Mill Stream’.”

The application for the renewal copyright was filed by petitioner in Smith’s name (D. Ex. D) as “One of the Authors”.

Sec. 23 of the Copyright Law (17 U. S. C.) provides that “the author of such work, if still living” or those in interest through him “if the author be not living—shall be entitled to a renewal”.

As Smith was not an “author” of the composition, obviously he would have no right of renewal as “One of the Authors”.

POINT III

The Trial Court properly excluded the testimony of Smith under Sec. 347 of the New York Civil Practice Act, concerning his alleged personal transaction with decedent Taylor.

A. Smith was incompetent to testify under Sec. 347.

Following are the pertinent parts of Sec. 347 (formerly Sec. 829, N. Y. Code of Civil Procedure):

"Upon the trial of an action * * * a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person * * * or a person deriving his title or interest from, through or under a deceased person * * * by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person * * *, except where the executor, administrator, survivor, * * * or person so deriving title or interest is examined in his own behalf, or the testimony of the * * * deceased person is given in evidence, concerning the same transaction or communication."

Smith's testimony concerning his alleged personal transaction with decedent Taylor was properly excluded because (a) he was interested in the event by reason of his royalty contract with petitioner (D. Ex. E) and petitioner derived its title and interest from him and (b) respondent derived its title and interest through decedent Taylor.

The copyright certificate having established Taylor's sole authorship, petitioner then had the affirmative of establishing its defense of Smith's co-authorship. This

is obviously what the Circuit Court meant when it said, "The appellee established a prima facie case by producing the copyright certificate, and while the ultimate burden was upon it to establish its right to a declaratory judgment of sole authorship of the copyrighted publication, the appellant had the burden of establishing its affirmative defense, and we are not persuaded that the District Judge was clearly wrong in holding that it failed to do so."

B. The certificate of copyright registration was not testimony of decedent Taylor constituting a waiver under Sec. 347. It is the settled construction of the New York Court of Appeals that such testimony means the "sworn" statements of the decedent.

Matter of Callister, 153 N. Y. 294, 305, 306:

"Section 829 of the Code * * * makes two exceptions to the general prohibition, viz.: Where the personal representative of the decedent is examined in his own behalf, or the testimony of the deceased person is given in evidence concerning the same transaction or communication. * * * There is a distinction between testimony and evidence, * * * Testimony is personal, for it is the utterance under oath of a person, while evidence may be either documentary or oral. When a carefully drawn statute relating to evidence, aiming to preserve equality and to prevent unfair advantage, speaks of 'the testimony of * * * the deceased person' as 'given in evidence', we think it means by testimony the sworn statements of the deceased made on some prior occasion. (*Lyon v. Ricker*, 141 N. Y. 225, 231.) * * * The promissory note given by John Callister to his wife was evidence, but it was not the testimony of a deceased person. It would be a loose and dangerous construction to hold that when an instrument executed by a dead man is read in evidence by those who represent him, the living party to the document can testify to whatever was said and done when it was executed."

In *Matter of Seigle*, 289 N. Y. 300, 302, 303, the Court of Appeals cited and followed its prior determination in *Matter of Callister*, *supra*. The case is precisely in point, the Court saying that although certain checks executed by decedent and offered in evidence by the executors raised a presumption of payment of a promissory note, testimony was correctly excluded under Sec. 347, which sought to prove that the checks "were given by decedent for a purpose other than the payment of the note."

None of the cases cited by petitioner have any application.

In *Matter of Boesenberg*, 265 App. Div. 484, there were offered "self serving declarations * * * for the purpose of establishing an offer by the deceased husband to resume marital relations with his wife". The Court said that it was improper for the Surrogate to have considered such self serving declarations "as establishing the matters therein set forth."

In both *Kings County Trust Co. v. Hyams*, 242 N. Y. 405 and *Merritt v. Campbell*, 79 N. Y. 625, plaintiff had made defendant its own witness as to the same personal transaction in respect to which defendant's testimony was subsequently offered.

In *Lewis v. Merritt*, 98 N. Y. 206, plaintiff's executor waived the privilege by being examined in his own behalf, as to the same personal transaction in respect to which defendant's testimony was subsequently offered.

In *Lawyer v. White*, 198 N. Y. 318, the testimony concerned only "evidence of facts not constituting the transaction and not proving any communications between the parties, and which had nothing to do with the negotiations".

Petitioner's argument under Point IV of its brief merely a repetition of its argument under Point III and B, and has been answered under Point III A and *supra*.

The application should be denied.

Respectfully submitted,

JULIAN T. ABELES,
EDWIN P. KILROE,
Counsel for Respondent

